

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,)
Appellant,) Case No. 07-570
v.) Appeal from the Public Utilities Commission
The Public Utilities Commission of Ohio,) of Ohio
Appellee.) Public Utilities Commission of Ohio
Case No. 06-1002-TP-BLS

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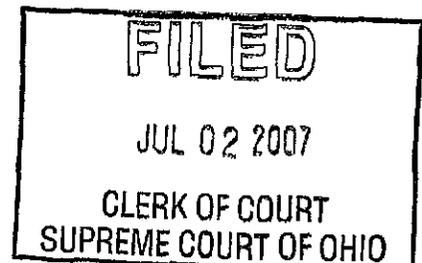
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES	iii
APPENDIX TABLE OF CONTENTS	vii
I. STATEMENT OF THE FACTS AND CASE.....	1
A. Summary of Argument.....	1
B. Standard of Review.....	4
C. Governing Law	4
D. Statement of the Case.....	7
1. The rulemaking proceeding	7
2. CBT’s application	9
E. Statement of Facts.....	11
II. ARGUMENT.....	15
A. Proposition of Law No. 1: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT’s stand-alone basic service based on a finding that there are competition and alternatives for basic service that is part of a service bundle. Rules that permit such a grant are invalid as contrary to the statute.	15
1. The service under consideration is stand-alone basic service.	16
2. The alternative providers that the PUCO allowed do not offer stand-alone basic service.....	17
3. The PUCO’s rationale for considering bundles does not comport with the law.....	20

TABLE OF CONTENTS cont'd

PAGE

B.	Proposition of Law No. 2: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service throughout CBT's exchanges when competition and alternatives exist in only part of the exchange. Rules that permit such a grant are invalid.....	27
1.	Neither Time Warner nor Current serve the entirety of the exchanges for which they are claimed by CBT.....	28
2.	The PUCO's rationale for accepting Time Warner and Current does not comport with the statute.	29
3.	The wireless carriers do not provide service throughout the CBT exchanges.....	33
C.	Proposition of Law No. 3: The Public Utilities Commission of Ohio erred as a matter of law when it adopted a rule that allows alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service based on an incumbent telephone company's line losses.	35
D.	Proposition of Law No. 4: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT's stand-alone basic service without a showing of a lack of barriers to entry for stand-alone basic service. Rules that permit such a grant are invalid.	39
E.	Proposition of Law No. 5: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT's stand-alone basic service without a showing that alternative regulation is in the public interest. Rules that permit such a grant are invalid.	43
III.	CONCLUSION.....	46
	CERTIFICATE OF SERVICE	47
	APPENDIX (separately bound)	

TABLE OF AUTHORITIES

PAGE

Cases

Canton Storage and Transfer Co. v. Public Util. Comm. (1995), 72 Ohio St. 3d 14, 40

Cleveland Elec. Illuminating Co. v. Public Util. Comm. (1996), 76 Ohio St.3d 52143

Cleveland Elec. Illuminating Co. v. Pub. Util. Comm. (1975), 42 Ohio St.2d 4034, 45

Craun v. Pub. Util. Comm. (1954), 162 Ohio St. 98

East Ohio Gas v. Pub. Util. Comm. (1988), 39 Ohio St.3d 29540

Grafton v. Ohio Edison (1996), 77 Ohio St.3d 1024

Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm. (1994), 68 Ohio
4St.3d 5594

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 384, 2006-Ohio-58531

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-57891

Ohio Consumers' Counsel v. Pub. Util. Comm., 109 Ohio St.3d 511, 2006-Ohio-30541

Ohio Consumers' Counsel v. Pub. Util. Comm., 109 Ohio St.3d 328, 2006-Ohio-21101

State, ex rel. Celebrezze, v. National Lime & Stone Company (1994), 68 Ohio St.3d 37715

Stephens v. Pub. Util. Comm. (2004), 102 Ohio St.3d 44, 2004 Ohio 179816

Tongren v. Pub. Util. Comm. (1999), 85 Ohio St.3d 8715

Vectren Energy Delivery of Ohio, Inc., v. Pub. Util. Comm., 113 Ohio St.3d 180, 2007-
Ohio-138638

TABLE OF AUTHORITIES cont'd

PAGE

Entries and Orders of the Public Utilities Commission of Ohio

In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates, Case No. 93-432-TP-ALT, Opinion and Order (May 5, 1994).....43

In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 04-720-TP-ALT, Opinion and Order (June 30, 2004).....3, 43

In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS, Opinion and Order (November 28, 2006)..... passim

In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS, Entry on Rehearing (January 31, 2007).....21, 24, 33

In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 06-1013-TP-BLS, Opinion and Order (December 20, 2006).....2

In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 07-259-TP-BLS, Opinion and Order (June 27, 2007).2

In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies, Case No. 00-1532-TP-COI, Opinion and Order (December 6, 2001).....7, 15, 42, 45

In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Companies, Case No. 92-1149-TP-COI, Finding and Order (January 7, 1993).43

TABLE OF AUTHORITIES cont'd

PAGE

In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies, PUCO Case No. 05-1305-TP-ORD, Opinion and Order (March 7, 2006) passim

In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies, PUCO Case No. 05-1305-TP-ORD, Entry on Rehearing (May 3, 2006)..... passim

Statutes

R.C. 1.47	40
R.C. 111.15(A)(1)	15
R.C. 119.01(C).....	15
R.C. 4927.01(A).....	5, 19
R.C. 4927.02(A).....	6
R.C. 4927.02(A)(1).....	25
R.C. 4927.02(A)(2).....	25
R.C. 4927.02(B).....	6
R.C. 4927.03	4, 17, 40, 43
R.C. 4927.03(A).....	passim
R.C. 4927.03(A)(1).....	passim
R.C. 4927.03(A)(1)(a).....	14, 29
R.C. 4927.03(A)(1)(b)	14, 29
R.C. 4927.03(A)(2).....	5, 17, 41
R.C. 4927.03(A)(2)(a).....	24, 35
R.C. 4927.03(A)(2)(b)	35

TABLE OF AUTHORITIES cont'd

	<u>PAGE</u>
R.C. 4927.03(A)(2)(c).....	passim
R.C. 4927.03(A)(2)(d)	24, 35
R.C. 4927.03(A)(3).....	passim
R.C. 4927.03(D).....	6, 13, 15

PUCO Rules

Ohio Adm. Code 4901:1-04-01(C)(1)	18
Ohio Adm. Code 4901:1-04-01(C)(3)	18
Ohio Adm. Code 4901:1-04-01(I)	7
Ohio Adm. Code 4901:1-04-01(M).....	7
Ohio Adm. Code 4901:1-04-06	43
Ohio Adm. Code 4901:1-04-09(D).....	9
Ohio Adm. Code 4901:1-04-09(F)	9
Ohio Adm. Code 4901:1-04-10(A).....	9, 30, 34, 41
Ohio Adm. Code 4901:1-04-10(C).....	9
Ohio Adm. Code 4901:1-04-10(C)(1)	18
Ohio Adm. Code 4901:1-04-10(C)(3)	18, 36
Ohio Adm. Code 4901:1-04-10(C)(4)	10, 24, 30

APPENDIX
TABLE OF CONTENTS

	<u>PAGE</u>
Notice of Appeal (March 30, 2007)	000001
<i>In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS, Opinion and Order (November 28, 2006).</i>	000058
<i>In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS, Entry on Rehearing (January 31, 2007).</i>	000090
<i>In the Matter of the Application of the Cincinnati Bell Telephone Company LLC For Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4 Ohio Administrative Code, Case No. 06-1002-TP-BLS, Application for Rehearing (December 28, 2006).</i>	000105
 <u>Other PUCO Orders</u>	
<i>In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates, Case No. 93-432-TP-ALT, Opinion and Order (May 5, 1994).</i>	000157
<i>In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 04-720-TP-ALT, Finding and Order (June 30, 2004).</i>	000226
<i>In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 06-1013-TP-BLS, Opinion and Order (December 20, 2006).</i>	000244
<i>In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 07-259-TP-BLS, Opinion and Order (June 27, 2007).</i>	000310
<i>In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies, Case No. 00-1532-TP-COI, Opinion and Order (December 6, 2001).</i>	000339

APPENDIX
TABLE OF CONTENTS cont'd

	<u>PAGE</u>
<i>In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Companies, Case No. 92-1149-TP-COI, Finding and Order (January 7, 1993).</i>	000395
<i>In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies, PUCO Case No. 05-1305-TP-ORD, Opinion and Order (March 7, 2006).</i>	000440
<i>In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies, PUCO Case No. 05-1305-TP-ORD, Entry on Rehearing (May 3, 2006).</i>	000511
 <u>Statutes</u>	
R.C. 1.47	000560A
R.C. 111.15	000561
R.C. 119.01	000573
R.C. 4927.01	000590
R.C. 4927.02	000592
R.C. 4927.03	000593
 <u>PUCO Rules</u>	
Ohio Adm. Code 4901:1-4-01	000595
Ohio Adm. Code 4901:1-4-06	000598
Ohio Adm. Code 4901:1-4-09	000605
Ohio Adm. Code 4901:1-4-10	000607

I. STATEMENT OF THE FACTS AND THE CASE

A. Summary of Argument

For a variety of reasons in a number of recent cases, this Court has reversed, vacated or modified the Public Utilities Commission of Ohio's ("PUCO's") misapplication of Ohio's regulatory statutes.¹ This appeal represents another occasion on which the Court should correct the PUCO's misapplication of law, and thus restore for consumers the law's intended protections against rate increases.

This appeal presents a case of first impression for this Court: It is the first case addressing the H.B. 218 amendments made in 2005 concerning alternative regulation ("alt. reg.") for the basic local exchange service ("basic service") that telephone companies offer to consumers in Ohio. It is the first case considering the legality of the basic service alt. reg. rules adopted by the PUCO in 2006.² And it is the first case to consider an application under those rules by an incumbent telephone company, in this case Cincinnati Bell Telephone Company

¹ See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853 (denial of intervention); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (failure to allow discovery of settlement agreements; modification of order on rehearing); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054 (vacating PUCO order); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110 (approval of rate stabilization plan that did not require rate determined by competitive bid).

² *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies*, PUCO Case No. 05-1305-TP-ORD, Opinion and Order (March 7, 2006) (OCC Appendix ("Appx.") at 000440); *id.*, Entry on Rehearing (May 3, 2006) (Appx. at 000511).

("CBT") in its two largest exchanges.³ Under those rules, if the PUCO grants basic service alt. reg. to a telephone company, then the company can annually increase customers' basic service rates (up to \$1.25 on monthly bills) in the future without applying to the PUCO. Within a month of the PUCO's approval of CBT's application, CBT increased basic service rates in those two exchanges by \$1.25 a month.⁴

H.B. 218 did not change the requirements of R.C. 4927.03(A) (Appx. at 000593) that alt. reg. can be granted only where it is shown that the service being examined -- in this case, basic service offered on its own to consumers (also known as "stand-alone" basic service) and not as part of a bundle of services -- is subject to competition or that the customers of that service have reasonably available alternatives. Under the PUCO's rules, however, as interpreted and applied to the information provided by CBT, the PUCO has granted alt. reg. for CBT's stand-alone basic service where competitors provide basic service only as part of bundles. This violates the very heart of R.C. 4927.03(A) (Appx. at 000593), including the requirement that the PUCO consider functionally equivalent and substitute services readily available at competitive rates, terms and conditions.⁵

³ Subsequent to CBT's filing, AT&T Ohio filed two basic service alt. reg. applications. The first, *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-1013-TP-BLS (Appx. at 000244), was decided by the PUCO and is currently on appeal by OCC to this Court as Case No. 07-659. The second, *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-259-TP-BLS, was decided on June 27, 2007 (Appx. at 000310).

⁴ See CBT tariff filing (January 4, 2007), (OCC Supplement ("Supp.") at 000080).

⁵ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

CBT has had alt. reg. for such bundles of services since June 30, 2004.⁶ In granting alt. reg. to CBT's stand-alone basic service, however, the PUCO has allowed the Company to raise rates for CBT's "bare minimum" service, for which there is no competition that would meet the standards of R.C. 4927.03(A) (Appx. at 000593).

The PUCO's rules examine whether an incumbent telephone company qualifies for basic service alt. reg. in each exchange covered by the application. Under those rules, as interpreted and applied to the information provided by CBT, the PUCO has granted alt. reg. to CBT's stand-alone basic service in two exchanges even though some of the so-called competitors serve only part of the exchange. Thus there are CBT customers in the two exchanges who cannot avail themselves of the supposed competitive alternatives, yet have seen their basic service rate increase.

The PUCO's rules -- and the proof adduced by CBT -- also fail to show two other conditions required by R.C. 4927.03(A) (Appx. at 000593) for alt. reg.: (1) that there are no barriers to entry for competitors to offer stand-alone basic service in these two CBT exchanges; and (2) that the grant of alt. reg. to CBT for its stand-alone basic service is in the public interest. For all of these reasons, the PUCO's grant of basic service alt. reg. for CBT should be reversed or vacated, and the PUCO should be directed -- as this Court has done in recent cases -- to follow the statutes under which the PUCO is required to regulate.

⁶ *In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code, Case No. 04-720-TP-ALT, Opinion and Order (June 30, 2004) (Appx. at 000226).*

B. Standard of Review

This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 563. Under this standard of review, the Court should reverse the PUCO's illegal effort to legislate a result rather than abide by Ohio law.

The Court's review of the case below is important because the PUCO has again gone beyond its statutory authority, with a result that CBT's residential customers have seen their basic service rates increase, and with the potential for annual rate increases to follow. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to act beyond the authority allowed under Ohio statutes. See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1.

C. The Governing Law

R.C. 4927.03 (Appx. at 000593), originally enacted in 1989, allows alt. reg. for a telecommunications service if two conditions are met: (1) if the service is subject to competition or customers have reasonably available alternatives to that service; and (2) if alt. reg. is in the public interest. Basic service was, however, exempted from alt. reg. under this statute until 2005, when the General Assembly passed H.B. 218.⁷ The amended R.C. 4927.03 now reads:

(A)(1) The public utilities commission * * * may, by order, exempt any such telephone company or companies, as to any public telecommunications service, **including basic local exchange service**, from any provision of Chapter 4905. or 4909., or sections 4931.01 to

⁷ H.B. 218.

4931.35 of the Revised Code or any rule or order adopted or issued under those provisions, or establish alternative regulatory requirements to apply to such public telecommunications service and company or companies; provided the commission finds that any such measure is in the public interest and either of the following conditions exists:

a) The telephone company or companies are subject to competition with respect to **such public telecommunications service**;

(b) The customers of **such public telecommunications service** have reasonably available alternatives.

(Emphasis added.) Basic service is defined as “end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer’s premises, to originate or receive voice communications within a local service area * * *.”⁸ Thus “such telecommunications service,” in the context of consideration of alt. reg. for basic service, refers to stand-alone basic service and does not include bundled services or any other service.

The General Assembly imposed a specific additional condition on basic service alt. reg.:

(3) To authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that **there are no barriers to entry**.⁹

Again, in context this would require a showing that there were no barriers to entry for the provisioning of stand-alone basic local exchange service.

In H.B. 218, the General Assembly did not alter the specific factors that the PUCO is required to consider in granting alt. reg. These factors are found in R.C. 4927.03(A)(2) (Appx. at 000593):

⁸ R.C. 4927.01(A) (Appx. at 000590). The sub-parts of the statute make clear that basic service does not include the other services that telephone companies provide in their bundles.

⁹ R.C. 4927.03(A)(3) (emphasis added) (Appx. at 000593).

(2) In determining whether the conditions in division (A)(1)(a) or (b) of this section exist, factors the commission **shall** consider include, but are not limited to:

- (a) The number and size of alternative providers of services;
- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions;
- (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(Emphasis added.) The General Assembly did, however, amend the state policy which the PUCO must consider¹⁰ in implementing R.C. 4927.03(A) (Appx. at 000593):

It is the policy of this state to:

- (1) Ensure the availability of adequate basic local exchange service to citizens throughout the state;
- (2) Rely on market forces, *where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market*, to maintain just and reasonable rates, rentals, tolls, and charges for public telecommunications service; * * *.¹¹

This statutory framework controls the PUCO's powers in this context. As this brief will show, the PUCO has not followed the statute.

¹⁰ R.C. 4927.02(B) (Appx. at 000592).

¹¹ R.C. 4927.02(A) (Appx. at 000592). The italicized material was added by H.B. 218.

D. Statement of the Case

1. The rulemaking proceeding

H.B. 218 went into effect on November 4, 2005. The statute required the PUCO to adopt rules to implement the provisions of the law.¹²

The PUCO adopted rules *In the Matter of the Implementation of H.B. 218 Concerning Alternative Regulation of Basic Local Exchange Service of Incumbent Local Exchange Companies*, PUCO Case No. 05-1305-TP-ORD (“05-1305”) (Appx. at 000440). The PUCO opened the docket with an Entry that included a PUCO staff proposal. The staff proposal sought to adopt new rules and rearranged others in then-current Ohio Adm. Code Chapter 4901:1-4, to allow for basic service alt. reg.¹³

The staff proposal identified three so-called “competitive market tests,” under which, if met, companies would be deemed to have met the requirements for alt. reg. under R.C. 4927.03(A) (Appx. at 000593) and would thus be allowed to increase basic service rates. The staff proposal also contained a process by which an incumbent telephone company could apply for basic service alt. reg. in specific exchanges.¹⁴

¹² R.C. 4927.03(D) (Appx. at 000594), as amended.

¹³ That chapter was first adopted in 2001 *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, Case No. 00-1532-TP-COI, Opinion and Order (December 6, 2001) (Appx. at 000339).

¹⁴ An “incumbent” telephone company is, inter alia, any facilities-based local exchange carrier that provided basic service to a designated territory when the federal Telecommunications Act of 1996 was enacted. See Ohio Adm. Code 4901:1-4-01(I) (Appx. at 000596). A telephone “exchange” is defined as “a geographical service area established by an [incumbent] and approved by the commission, which usually embraces a city, town, or village and a designated surrounding or adjacent area. There are currently seven hundred thirty-eight exchanges in the state.” Ohio Adm. Code 4901:1-4-01(M) (Appx. at 000597).

The PUCO received comments and reply comments on the staff proposal from the industry and from consumer representatives including OCC (“Consumer Groups”). In addition, upon the motion of the Consumer Groups, the PUCO held a series of local public hearings in seven cities around the state.

In the 05-1305 Opinion and Order issued March 7, 2006 (Appx. 000440), the PUCO adopted changes to the staff-proposed rules. Among these changes were provisions that limited basic service rate increases to \$1.25 per year, and others that changed the PUCO staff’s proposed basic service alt. reg. application process. The PUCO decision incorporated PUCO staff’s proposals by which an incumbent could qualify for basic service alt. reg., but also adopted a new competitive test, which was the one ultimately used by CBT in the case below.

After applications for rehearing were filed, including by the Consumer Groups, an Entry on Rehearing was issued on May 3, 2006 (Appx. at 000511), setting final rules.¹⁵ The rules became effective on August 7, 2006.¹⁶

The rules adopted a total of four competitive tests, and provide, as relevant here, that

[i]f the applicant can demonstrate that at least one of the following competitive market tests is satisfied in a telephone exchange area, the applicant will be deemed to have met the statutory criteria found in division (A) of section 4927.03 of the Revised Code for basic service and other tier one services in that telephone exchange area.

....

(4) An applicant must demonstrate that in each requested telephone exchange area that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant’s annual report filed with the commission in 2003, reflecting data for 2002; **and** the presence of

¹⁵ Pursuant to *Craun v. Pub. Util. Comm.* (1954), 162 Ohio St. 9, affected parties cannot take a direct appeal from a PUCO rulemaking.

¹⁶ Opinion and Order at 2 (Appx. at 000059).

at least five unaffiliated facilities-based alternative providers serving the residential market.¹⁷

Under these rules, the applicant explicitly bears the burden of demonstrating that it meets one of the competitive tests for each exchange contained in the application.¹⁸ Within Test 4, the applicant must show that it meets both prongs of the test for each exchange, that is, that it has lost fifteen per cent of its total residential access lines since 2002 (the “line loss” prong) **and** that there are at least five unaffiliated facilities-based alternative providers serving the residential market in the exchange (the “alternative providers” prong).

The rules provide that interested persons may intervene within 14 days of the filing of an application.¹⁹ The rules also state that “[a]ny person or party who can show good cause why such application should not be granted must file with the commission a written statement detailing the reasons within forty-five calendar days after the application is docketed.”²⁰

2. CBT’s application

On August 7, 2006, the very day that the PUCO’s rules became effective, CBT filed its application for basic service alt. reg. for its two largest exchanges, Cincinnati and Hamilton.²¹ In its application, CBT asserted that Test 4 was met in the two exchanges, and did not invoke any of

¹⁷ Ohio Adm. Code 4901:1-4-10(C) (emphasis added) (Appx. at 000607).

¹⁸ Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000607).

¹⁹ Ohio Adm. Code 4901:1-4-09(D) (Appx. at 000605).

²⁰ Ohio Adm. Code 4901:1-4-09(F) (Appx. at 000606).

²¹ These exchanges extend beyond the municipal boundaries of the cities of Cincinnati and Hamilton.

the three other competitive market tests.²² As set forth above, under Test 4, an incumbent is eligible for basic service alt. reg. in an exchange if it shows it has lost 15% of its residential access lines in that exchange since 2002 (the “line loss” prong of the Test), **and** it shows the presence of at least five unaffiliated facilities-based alternative providers serving the residential market in the exchange (the “alternative providers” prong).

On August 6, 2006, OCC moved to intervene in the case; OCC’s intervention was granted by Entry dated September 29, 2006.²³ On September 21, 2006, OCC had filed, pursuant to the PUCO’s rules, a detailed opposition to CBT’s application, including the affidavits of two telecommunications experts.²⁴

Pursuant to the September 29, 2006 Entry, on October 6, 2006, CBT filed its response to OCC’s opposition. Likewise, on October 13, 2006, OCC filed its reply to CBT’s response.

On November 28, 2006, the PUCO issued its Opinion and Order granting CBT’s application in its entirety. The PUCO found that CBT had shown that it met both the line loss prong and the alternative providers prong of Test 4, and also found that Test 4 met the terms of the R.C. 4927.03(A) requirements for basic service alt. reg. The Opinion and Order also incorporated the entire record of the 05-1305 rulemaking proceeding into the CBT docket.²⁵

On December 28, 2006, OCC timely filed its application for rehearing from the Opinion and Order. The application for rehearing, inter alia, argued: (1) that the PUCO’s interpretation

²² Application, Exhibit 3 at 1 (Supp. at 000012); see Ohio Adm. Code 4901:1-4-10(C)(4) (Appx. at 000608).

²³ See Opinion and Order at 1(Appx. at 000058).

²⁴ These experts also provided affidavits that were filed by the Consumer Groups in the 05-1305 rulemaking proceeding.

²⁵ Opinion and Order at 8 (Appx. at 000065).

of the statute as reflected in the basic service alt. reg. rules was in error, (2) that the PUCO erred by treating bundles of service that include basic service as competition for stand-alone basic service, (3) that the PUCO's rules allowed basic service alt. reg. for customers who have no competition or alternatives, (4) that neither prong of Test 4 adequately addressed the factors that R.C. 4927.03(A)(2) (Appx. at 000593) requires the PUCO to consider, (5) that the PUCO erred in finding no barriers to entry for the provision of stand-alone basic service in the two CBT exchanges, and (6) that granting alt. reg. for CBT's stand-alone basic service was not in the public interest.

On January 31, 2007, the PUCO issued its Entry on Rehearing denying OCC's application for rehearing in its entirety. For the most part, the Entry on Rehearing did not contain any detailed responses to OCC's arguments, stating merely that OCC had "raised no new arguments for the PUCO's consideration."²⁶

This appeal followed. As demonstrated herein, the PUCO's basic service alt. reg. rules, and its implementation of those rules in this proceeding, did not follow the law set forth in R.C. 4927.03(A) (Appx. at 000593). The PUCO's decision granting alt. reg. for CBT's stand-alone basic service should be reversed. Likewise Test 4 -- which is the test used by CBT and approved by the PUCO -- should be invalidated.

E. Statement of Facts

In 2001, as discussed above, the PUCO determined that bundles of services that include basic service met the terms of R.C. 4927.03(A) (Appx. at 000593), and in 2004 CBT was granted

²⁶ See, e.g., Entry on Rehearing at 3-5 (Appx. at 000092-000094).

alt. reg. for those bundled services. The proceeding below and this appeal thus focus on CBT's stand-alone basic service in the Cincinnati and Hamilton exchanges.

The Cincinnati exchange had 286,000 residential access lines as of 2005 and the Hamilton exchange had 55,000 residential access lines as of 2005.²⁷ The Cincinnati and Hamilton exchanges together serve 75% of CBT's local Ohio residential access lines.²⁸ The number of stand-alone basic service lines represented within these totals was asserted by CBT to be a proprietary number and is therefore not publicly available.

CBT asserted that it had lost more than 15% of its residential access lines since 2002.²⁹ The PUCO accepted this as meeting the first prong of Competitive Test 4. OCC's expert stated:

The question of whether the Cincinnati and Hamilton exchanges pass or fail the first prong of Test 4 can only be answered after revising the Company's calculation to exclude: (1) lines transferred to the Company's DSL and wireless affiliates; (2) lines transferred to other broadband providers; and (3) lines disconnected and not reconnected with an alternative provider within the Company's service area.³⁰

CBT's information does not allow such an analysis. Thus it cannot be said that CBT has passed the line loss test in either the Cincinnati or the Hamilton exchanges.

The second prong of Test 4 requires that the applicant show the "presence of at least five unaffiliated facilities-based alternative providers serving the residential market." The record shows that none of the provider candidates put forth by CBT provide stand-alone basic service.

²⁷ CBT Application (August 6, 2006) ("Application"), Exhibit A (Supp. at 000011).

²⁸ See Office of the Ohio Consumers' Counsel's Opposition to Application by Cincinnati Bell Telephone Company for Basic Local Service Alternative Regulation; Demonstration Why the Application Should Not Be Granted (September 21, 2006) ("OCC Opposition") at 2-3, citing CBT 2005 PUCO Annual Report (Supp. at 000013).

²⁹ CBT Application (August 6, 2006) ("Application"), Exhibit A (Supp. at 000011).

³⁰ Williams Affidavit, ¶22 (Supp. at 000051A).

First, there are the wireless carriers, Cingular, Sprint, T-Mobile and Verizon.³¹ OCC's expert showed that these carriers do not provide basic service as the statute defines it, because wireless phones do not offer customers a functional equivalent or substitute for dial tone; do not yet offer customers a functional equivalent or substitute for E9-1-1 emergency service; and miss the definition in other ways.³²

The "wireline" carriers that CBT included in its application, Current Communications and Time Warner Cable,³³ do not provide stand-alone basic service. Time Warner's service, "Digital Phone," based on Internet protocol ("IP") and provided over Time Warner's private IP network, is only available as a one-size-fits-all bundle that includes flat-rate local service, flat-rate long distance calling in the U.S. and Canada, and more than ten vertical calling features.³⁴ Current offers, over electric lines, only a single all-you-can-eat voice service with unlimited long distance and a dozen or so features, which places it in a distinctly different product market than CBT's BLES service.³⁵

The services of the alternative providers are not competitively priced compared to CBT's standalone basic service. CBT's residential basic service rates in the Cincinnati and Hamilton exchanges at the time of the application were \$16.95 per month and \$17.95 per month, depending on the location within the exchange. When the non-bypassable subscriber line charge

³¹ Application at 8-12 (Supp. at 000006-000010).

³² Roycroft Affidavit, ¶¶46-52 (Supp. at 000027-000029A).

³³ Application at 3-8 (Supp. at 000001-000006).

³⁴ Roycroft Affidavit, ¶46 (Supp. at 000027).

³⁵ Williams Affidavit, ¶54 (Supp. at 000065).

is included, CBT's wireline basic service rates were \$22.19 and \$23.19 per month for customers.³⁶

By contrast, the wireless carriers' service is priced 159% to 260% higher than CBT's stand-alone basic service.³⁷ Time Warner's Digital Phone costs 72% more than CBT's stand-alone basic service.³⁸ Current's bundled service is priced 52-58% higher than CBT's stand-alone basic service.³⁹

Further, none of these carriers' services are available throughout the Cincinnati and Hamilton exchanges. Time Warner's franchise does not cover the entirety of the Cincinnati and Hamilton exchanges.⁴⁰ Likewise, Current's service in the Cincinnati exchange has a limited geographic reach.⁴¹ Based on the wireless carriers' own disclaimers, they cannot guarantee that their service will work for customers at any particular location, much less indoors at any particular location.⁴²

These are the facts most relevant to the question of whether the tests in R.C. 4927.03(A)(1)(a) and (b) (Appx. at 000593) have been met for CBT's stand-alone basic service in the Cincinnati and Hamilton exchanges. As to the R.C. 4927.03(A)(1) (Appx. at 000593) requirement that alt. reg. be in the public interest, and the R.C. 4927.03(A)(3) (Appx. at 000593-

³⁶ Roycroft Affidavit, ¶71(Supp. at 000030).

³⁷ Id., ¶74 (Supp. at 000031).

³⁸ Williams Affidavit, ¶48 (Supp. at 000062).

³⁹ Id., ¶59 (Supp. at 000066).

⁴⁰ Id., ¶43 (Supp. at 000059).

⁴¹ Id., ¶53 (Supp. at 000064).

⁴² Roycroft Affidavit, ¶¶100-104 (Supp. at 000037-000042).

000594) requirement that a lack of barriers to entry be shown, there are no facts and no other support in the record to show that the requirements are met.

II. ARGUMENT

A. **Proposition of Law No. 1: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT's stand-alone basic service based on a finding that there are competition and alternatives for basic service that is part of a service bundle. Rules that permit such a grant are invalid as contrary to the statute.**

“The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly.”⁴³ H.B. 218 required the PUCO to adopt rules implementing its amendments within 120 days after the effective date of the amendments.⁴⁴ The basic service alt. reg. rules do not, in fact, implement the H.B. 218 amendments.⁴⁵ Further, a rule issued “pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute * * *.”⁴⁶ The PUCO rules setting forth the competitive tests -- and therefore their application in the instant case -- are unreasonable and do not follow the statute, and thus do not

⁴³ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 88.

⁴⁴ R.C. 4927.03(D) (Appx. at 000594).

⁴⁵ R.C. 119.01(C) (Appx. at 000574) defines a “rule” as “any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency *under the authority of the laws governing such agency...*” (Emphasis added.) Given their conflict with R.C. 4927.03(A) (Appx. at 000593), the BLES alt. reg. rules were not issued “under the authority of the laws.” See also R.C. 111.15(A)(1) (Appx. at 000561).

⁴⁶ *State, ex rel. Celebrezze, v. National Lime & Stone Company* (1994), 68 Ohio St.3d 377, 383.

allow alt. reg. to be granted to CBT's stand-alone basic service in the Cincinnati and Hamilton exchanges. This is first shown in the fact that the PUCO allowed bundles of services to be treated as competition or alternatives for stand-alone basic service.

1. The service under consideration is stand-alone basic service.

In 2001, the PUCO found that bundles of services that include basic service -- along with almost all services other than stand-alone basic service -- met the requirements of R.C. 4927.03(A) (Appx. at 000593), and were subject to alternative regulation.⁴⁷ That decision was upheld by this Court in 2004.⁴⁸ The General Assembly was aware of the PUCO's rulings when it addressed H.B. 218 in 2005.⁴⁹

After the PUCO's ruling in 2001, the only service not subject to alt. reg. was stand-alone basic service. Stand-alone basic service, therefore, was the focus of the General Assembly's actions in H.B. 218. That should also have been the focus of the PUCO's rulemaking in 05-1305; unfortunately, the PUCO missed that point in adopting the basic service alt. reg. rules and also in applying those rules to CBT.

In order for the PUCO to authorize alt. reg. for stand-alone basic service, the PUCO must find that one or both of the following conditions exist:

⁴⁷ *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, Case No. 00-1532-TP-COI, Opinion and Order (December 6, 2001) (Appx. at 000339).

⁴⁸ *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 2004-Ohio-1798.

⁴⁹ See testimony of Commissioner Ronda Hartman Fergus to House Public Utilities and Energy Committee (May 18, 2005) at 3 ("Under [the elective alt. reg.] plan, a local telephone company can price its service offerings, except for stand-alone basic local telephone service and basic caller ID, at whatever rates the company thinks the market will bear, and the company can also change those rates on a 0-day notice with no approval from the Commission.") (Supp. at 000084).

a) The telephone company or companies are subject to competition with respect to such public telecommunications service;

(b) the customers of such public telecommunications service have reasonably available alternatives.⁵⁰

In an application for alt. reg. for stand-alone basic service, “such public telecommunications service” refers to stand-alone basic service. It does not refer to basic service as part of bundles, which were granted alt. reg. status in 2001.

The PUCO acknowledged that “[p]rior to enactment of H.B. 218, basic service was beyond the scope of alternative regulation under Section 4927.03, Revised Code (Appx. at 000593).”⁵¹ Again, based on the PUCO’s previous finding that bundles could be granted alt. reg., the consideration of CBT’s application was limited to the question of alt. reg. for **stand-alone basic service**. Thus the existence of competition or alternatives for basic service in bundles cannot be used to determine whether there is competition or customers have alternatives for stand-alone basic service.⁵²

2. The alternative providers that the PUCO allowed do not offer stand-alone basic service.

In attempting to meet its burden under the statute of showing competition or alternatives for its stand-alone basic service, CBT submitted information regarding five wireless carriers (Cingular, Cricket, Sprint, T-Mobile and Verizon⁵³) and two “wired” carriers (Current Communications and

⁵⁰ R.C. 4927.03(A)(2) (emphasis added) (Appx. at 000593).

⁵¹ 05-1305 Entry on Rehearing at 19 (Appx. at 000529).

⁵² See Williams Affidavit, ¶30 (Supp. at 000052).

⁵³ Application at 8-12 (Supp. at 000006-000010). The PUCO eventually eliminated Cricket, because it had not been operating in CBT territory long enough. Opinion and Order at 28 (Appx. at 000085).

Time Warner Cable⁵⁴). All seven were offered as alternative providers in the Cincinnati exchange, and all but Current were offered in the Hamilton exchange. Yet none of these carriers offer stand-alone basic service to customers. To the extent that they offer basic service or a similar service,⁵⁵ they offer it **only** as part of a bundle that includes other services (known as vertical services) and toll. Neither CBT nor the PUCO ever asserted that these providers offer stand-alone basic service.

R.C. 4927.03(A)(2)(c) (Appx. at 000593) requires the PUCO to consider whether functionally equivalent services are readily available for customers at competitive rates, terms and conditions. Wireless providers do not supply a service that is competitive with CBT's basic service. OCC's evidence presented an extensive review of the differences between the services offered by CBT's candidate wireless providers and CBT's basic service, showing that the services offered to customers are not functionally equivalent.⁵⁶ This is because: wireless phones do not offer customers a functional equivalent or substitute for dial tone⁵⁷; do not yet offer customers a functional equivalent or substitute for E9-1-1 emergency service⁵⁸; and fall short of the definition in other ways.⁵⁹

⁵⁴ Application at 3-8 (Supp. at 000001-000006).

⁵⁵ The wireless carriers do not offer BLES as defined by the statute. See Roycroft Affidavit, ¶¶ 46, 49-50 (Supp. at 000027, 000028-000029).

⁵⁶ Summarized in OCC Opposition at 19-26 (Supp. at 000015).

⁵⁷ Roycroft Affidavit, ¶¶ 46-48 (Supp. at 000027-000028); see Ohio Adm. Code 4901:1-04-01(C)(1) (Appx. at 000595).

⁵⁸ Roycroft Affidavit, ¶ 49 (Supp. at 000028); see Ohio Adm. Code 4901:1-04-01(C)(3) (Appx. at 000595).

⁵⁹ Roycroft Affidavit, ¶¶ 50-52 (Supp. at 000029-000029A).

Neither are the wireless carriers' rates competitive to CBT's stand-alone basic service rates. CBT's residential basic service rates in the Cincinnati and Hamilton exchanges at the time of the application were \$16.95 per month and \$17.95 per month, depending on the rate band within the exchange. When the non-bypassable subscriber line charge is included, CBT's wireline basic service rates were \$22.19 and \$23.19 per month for customers.⁶⁰ (After CBT's rate increases under its alt. reg. authority, these rates are \$23.44 and \$24.44 respectively.)

OCC presented evidence that showed the disparity between the wireless carriers' rates and CBT's stand-alone basic service rates. Dr. Roycroft stated that:

[f]or a CBT Rate Band 1 basic service customer, the price increase associated with substituting wireless for CBT's basic service ranges from * * * \$37.80 to \$57.80 (representing percentage increase amounts ranging from * * * 170%, to 260%). Similarly, for a CBT Rate Band 2 basic service customer, substituting wireless for wireline would result in rate increases of * * * \$36.80, or \$56.80 (representing percentage increase amounts ranging from * * * 159%, to 245%). * * * Competitive rates are rates which allow the consumer's choice to be unhindered by a significant price differential. Experiencing a price increase of more than 50% does not present the consumer with a "competitively priced" service. Such a price differential also does not provide much of a pricing constraint on CBT. Thus CBT's candidate wireless alternative providers do not, on the basis of price, provide a competing service with basic service.⁶¹

In fact, Dr. Roycroft's analysis also showed that "CBT's basic service rates and the prices of services offered by CBT's candidate wireless alternative providers are not comparable, even if the consumer already subscribes to wireless."⁶²

Neither is Time Warner's or Current's service functionally equivalent to or competitively priced to CBT's stand-alone basic service. Time Warner's service includes flat-rate local calling

⁶⁰ Roycroft Affidavit, ¶71(Supp. at 000030).

⁶¹ Id., ¶74 (emphasis in original) (Supp. at 000031).

⁶² Id., ¶77 (Supp. at 000034).

and unlimited long-distance calling in the United States and Canada **and** more than ten vertical features, at a price 72% higher than CBT's. Likewise, Current offers only an "all-you-can-eat" bundle that includes a dozen features at a price 51% higher than CBT's basic service.⁶³

3. The PUCO's rationale for considering bundles does not comport with the law.

In the Entry on Rehearing, the PUCO stated, "In developing the rules for basic service alternative regulation, the Commission focused on specific factors that would demonstrate for residential basic service customers that the statutory criteria of Section 4927.03(A), Revised Code (Appx. at 000593), was [sic] satisfied."⁶⁴ Yet despite the fact that the statute refers to competition and alternatives to "such service," referring to the service(s) for which alt. reg. is sought, and despite the fact that "such service" in this context is stand-alone basic service, the PUCO allowed the bundled services offered by the alternative providers to be used to qualify CBT's stand-alone basic service for alt. reg.⁶⁵ This is a crucial part of the PUCO's ruling; yet neither the Opinion and Order, the Entry on Rehearing, nor the rulings in 05-1305 provide support for the finding.

The PUCO ignored the information in the record concerning the significant price differentials between CBT's stand-alone basic service and other providers' bundled offerings.

⁶³ OCC Objections at 30 (Supp. at 000015A) and Williams Affidavit, ¶59 (Supp. at 000066).

⁶⁴ Entry on Rehearing at 2-3 (Appx. at 000091-000092).

⁶⁵ To the extent that the line loss prong of Test 4 discussed in Proposition of Law 3 "counts" losses of CBT's bundled service lines to alternative providers' bundled services as a basis for allowing alt. reg. for CBT's stand-alone BLES, the error discussed here is repeated in the PUCO's line loss prong discussion.

Instead, the PUCO's ruling provides that the mere presence of these bundled offerings -- at whatever price -- meets the requirements of the statute.

In the Opinion and Order, the PUCO cited to its earlier determination in the 05-1305 rulemaking Opinion and Order that the law does not restrict the analysis of competition and reasonably available alternatives "to the competitive products that are *exactly like* basic service."⁶⁶ As discussed above, the bundles offered to customers by the alternative providers are so different from stand-alone basic service -- in price, and in terms and conditions -- that they cannot be seen to be competition for CBT's stand-alone basic service. Nor can they be seen as reasonably available alternatives to CBT's stand-alone basic service. The bundles are not functional equivalents or substitutes, and they are not provided to customers at competitive rates, terms and conditions, to CBT's stand-alone basic service.⁶⁷ The PUCO never addressed this issue raised by OCC.

The PUCO also quoted the 05-1305 Opinion and Order to the effect that "customers that leave an ILEC's basic service offering to subscribe to another alternative provider's bundled service offering view such bundled service offerings as a reasonable alternative service, and a substitute to the ILEC's basic service."⁶⁸ In the 05-1305 Opinion and Order, the PUCO made the irrelevant and

⁶⁶ Opinion and Order at 13, quoting 05-1305 Opinion and Order at 25 (emphasis added) (Appx. at 000070); see also Entry on Rehearing at 9 (Appx. at 000098).

⁶⁷ 05-1305, Consumer Groups Comments, Williams Affidavit, ¶¶23-59 (Supp. at 000087-000122); Consumer Groups Reply Comments, Williams Affidavit, ¶¶19-20 (Supp. at 000123-000126).

⁶⁸ Opinion and Order at 13, quoting 05-1305 Opinion and Order at 25 (Appx. at 000070); see also Opinion and Order at 14 (Appx. at 000071).

inaccurate statement that “consumers’ perception of basic service is changing.”⁶⁹ The statement is irrelevant because basic service is defined by statute.⁷⁰

The statement was inaccurate -- and unsupported by the 05-1305 rulemaking record -- as shown by the PUCO’s citations to that record in the 05-1305 Opinion and Order. The PUCO stated, “More customers are substituting their traditional basic service with competitive service offered by wireline CLECs, wireless, VoIP and cable telephony providers” (Columbus Tr. at 27, 39; Cincinnati Tr. at 20, 33, 37, 39, 48; AT&T Initial Comments at 15-17).⁷¹ **None of the cited material discusses customers substituting other providers’ services for the incumbent telephone company’s stand-alone basic service -- that is, basic service *not* offered as part of a package bundled with other services.**⁷² Indeed, as discussed in OCC’s summary of the local public hearings held throughout the state, the public testimony was exactly the opposite: Customers throughout the state who want only stand-alone basic service have few or no alternatives to the incumbents’ basic service.⁷³

The PUCO stated that it rejected “OCC’s position that ... the functionally equivalent services must be similarly priced to CBT’s stand-alone basic service and have terms and conditions

⁶⁹ 05-1305 Opinion and Order at 25 (Appx. at 000464).

⁷⁰ R.C. 4927.01(A) (Appx. at 000590).

⁷¹ 05-1305 Opinion and Order at 25 (Appx. at 000464).

⁷² See Supp. at 000127-000139; Supp. at 000140-000144; Supp. at 000145-000147.

⁷³ See 05-1305, Corrected Comments of the Office of the Ohio Consumers’ Counsel on Local Public Hearings (February 23, 2006) at 2 (Supp. at 0000148). Given the PUCO decision to analyze basic service competition on an exchange-by-exchange basis, the presence of competition in one area of the state cannot be used to justify alt. reg. in another area.

similar to” CBT’s stand-alone basic service.⁷⁴ Yet the PUCO also noted that “Section 4927.03(A)(2)(c), Revised Code only requires that the **functionally equivalent** or substitute services be readily available at **competitive** rates, terms and conditions.”⁷⁵ The CBT candidate alternative providers’ services are so substantially different in price and in terms and conditions that they are **not** functionally equivalent and **not** competitively priced for customers.

The PUCO stated, however, that:

to the extent that CBT is losing basic service customers and the requisite number of alternative providers are present, it is evident that functionally equivalent or substitute services are readily available. The customers CBT loses must find the other providers’ rates, terms and conditions to be competitive to what they received from CBT’s basic service. Otherwise, it is reasonable to assume that they would not have switched from CBT’s basic service.⁷⁶

But just as customers move from CBT’s stand-alone basic service to CBT’s bundles, other customers may move from CBT’s stand-alone basic service to alternative providers’ bundles. This does not make the bundles, whether offered by CBT or by an alternative provider, competitive to stand-alone basic service, especially for stand-alone basic service customers who do not want the additional services. Again, the bundles are not functionally equivalent to stand-alone basic service. And again, as discussed above, services with prices that are 51%, 72%, 159%, 170%, 245% or 260% higher than CBT’s stand-alone basic service rates cannot reasonably be viewed as competitive to CBT’s stand-alone basic service.

⁷⁴ Opinion and Order at 14 (Appx. at 000071).

⁷⁵ Id.

⁷⁶ Id.

According to the PUCO, it “previously noted that every customer subscribing to a bundled service which includes basic service is, by definition, also a basic service customer.”⁷⁷ But competition and alternatives for bundles **that include basic service** do not represent competition for consumers who subscribe only to stand-alone basic service, either in terms of functional equivalents or substitutes, or in terms of competitive rates, terms and conditions.⁷⁸

The PUCO’s Test 4 merely requires the “presence” of at least five unaffiliated facilities-based providers,” and merely requires the alternative providers to be “serving” the residential market.⁷⁹ The rule does not require those providers to be serving the market with the statutorily-required “functionally equivalent or substitute services [that are] readily available at competitive rates, terms and conditions” to stand-alone basic service.⁸⁰ Indeed, as discussed above, the alternative providers “nominated” by CBT do not provide services for customers that are equivalents or substitutes for stand-alone basic service at competitive rates, terms or conditions, as required by law.

Further, the test, by requiring only a “presence” in the market, does not include any consideration of the size of alternative providers,⁸¹ or other indicators of market power such as market share or growth in market share.⁸² Neither does the “presence” of alternative providers show that market forces are capable of supporting a healthy and sustainable, competitive

⁷⁷ Entry on Rehearing at 18 (Appx. at 000075).

⁷⁸ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

⁷⁹ Ohio Adm. Code 4901:1-4-10(C)(4) (Appx. at 000608).

⁸⁰ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

⁸¹ R.C. 4927.03(A)(2)(a) (Appx. at 000593).

⁸² R.C. 4927.03(A)(2)(d) (Appx. at 000593).

telecommunications market.⁸³ Despite the law, the PUCO dismissed OCC's challenges to the rule, stating that:

factors like longevity in the competitive market, while somewhat noteworthy, do not have a direct bearing on the state of the competitive market at any given time. Rather, the Commission believes that criteria such as the required presence of several unaffiliated facilities-based providers is a more significant factor for supporting a healthy sustainable market, because this criteria [sic] demonstrates a greater commitment of a carrier to remain in the market as a competitor.⁸⁴

The fact that there are "several" providers in the market says nothing about the ability of any one of those providers to contribute to a **healthy, sustainable** competitive market, consistent with the State's telecommunications policy as amended by H.B. 218.⁸⁵

OCC's expert Dr. Trevor R. Roycroft provided a valuable analogy that was ignored by the PUCO: Some individuals are observed to drive automobiles, and others are observed to ride motorcycles. But this does not mean that consumers find motorcycles to be functional equivalents or substitutes for automobiles.⁸⁶ There may be a few individuals who use only a motorcycle, but for the vast majority of consumers who ride motorcycles, a motorcycle is a complement to, not a substitute for, an automobile. The relevance here is that "while it might be the case that we observe that a small number of individuals have 'cut the cord' and gone wireless, it does not follow that wireless telephony is a readily available functional equivalent to, or a substitute for, basic service."⁸⁷

⁸³ R.C. 4927.02(A)(1) (Appx. at 000592).

⁸⁴ Opinion and Order at 24 (Appx. at 000081).

⁸⁵ R.C. 4927.02(A)(2) (Appx. at 000592).

⁸⁶ Roycroft Affidavit, ¶19-20 (Supp. at 000023-000024).

⁸⁷ Id., ¶21 (Supp. at 000024).

Likewise, Dr. Roycroft observed that both the Ford Focus and the BMW 760Li are automobiles. This does not mean that customers find the BMW 760Li is a competing and reasonably available alternative for a Ford Focus, given that the starting price for the BMW 760Li is \$119,000 and the Focus is \$14,000.⁸⁸ The relevance here is that careful consideration must be given to the rates, terms, and conditions associated with the offerings of the alternative providers that have been identified by CBT. If these differ significantly from the rates, terms and conditions associated with basic service, then the services cannot be viewed as competing with basic service, and the wireless carriers cannot be considered alternative providers that satisfy the PUCO's Test 4.⁸⁹

CBT argued that Dr. Roycroft's analogies "do not reasonably apply to telephone service because they address degrees of luxury, as opposed to the use of variant technologies to achieve the primary goal of the product."⁹⁰ But the use of "variant technologies" is not at issue. The different technologies (e.g., wireless) come with all of the services included in the wireless bundles. By contrast, the stand-alone basic service for which CBT is seeking alt. reg. is a "stripped-down" means of telecommunications. Further, that bundling comes at a substantially higher price, not an "insignificant difference," as CBT argued.⁹¹ Two products need not be as different as motorcycles and automobiles to be minimally substitutable. Further, two products need not be as different in price as the Focus and the 760Li to be **not** competitively priced.

⁸⁸ Id., ¶23 (Supp. at 000025).

⁸⁹ Id., ¶24 (Supp. at 000025-000026).

⁹⁰ CBT Response at 23 (Supp. at 000067).

⁹¹ Id. at 46 (Supp. at 000069).

Such is the situation with CBT's stand-alone basic service and the wireless and wireline bundles of the alternative providers that CBT has nominated. The PUCO's use of the presence of bundles to justify alt. reg. for stand-alone basic service is contrary to the law and must be reversed. If CBT had presented alternative providers that offer stand-alone basic service, or if the PUCO had interpreted its rule to require that presentation, this appeal would not likely have been necessary.⁹²

B. Proposition of Law No. 2: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service throughout CBT's exchanges when competition and alternatives exist in only part of the exchange. Rules that permit such a grant are invalid.

As discussed above, the bundles of services accepted by the PUCO are not competition for or alternatives to CBT's stand-alone basic service. But the services are also not "readily available" to customers throughout the CBT exchanges under examination.⁹³

In adopting the competitive market tests, the PUCO rejected incumbents' proposals to gauge competition by Metropolitan Statistical Area or by the entire incumbent's service area, in favor of applying the tests on an exchange basis, ostensibly in order to analyze at a granular level whether competition exists for customers in specific areas.⁹⁴ But the PUCO has applied the rule to allow consideration of providers that operate in only parts of the exchanges under review.

⁹² In that event, the lack of barriers to entry would have been likely, and the public interest would have likely been served.

⁹³ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

⁹⁴ 05-1305 Opinion and Order at 17-19 (Appx. at 000456-000458). The PUCO also rejected the ILECs' applications for rehearing of the exchange-level assessment of competition. 05-1305 Entry on Rehearing at 12-13, 15 (Appx. at 000522-000523, 000525).

1. Neither Time Warner nor Current serve the entirety of the exchanges for which they are claimed by CBT.

CBT asserted Time Warner and Current as alternative providers within the Cincinnati exchange, and Time Warner within the Hamilton exchange.⁹⁵ Yet those carriers serve only portions of these exchanges.

Time Warner's franchise does not cover the entirety of the Cincinnati and Hamilton exchanges.⁹⁶ As OCC's affidavit stated, the maps submitted by CBT "demonstrate [that] there is a 'remarkable correlation' to the locations in these two exchanges where customers are *unable* to obtain Time Warner's residential telephone service, whether they want it or not."⁹⁷ Likewise, Current's service in the Cincinnati exchange has a limited geographic reach.⁹⁸

To ignore the fact that alternative providers like Current and Time Warner do not serve the entirety of the exchange renders moot the PUCO's decision to analyze competition at the exchange level. This is particularly true for Current and Time Warner, because they offer service over their own facilities that are limited in extent, and they cannot offer service where those facilities do not exist.

There will therefore be CBT stand-alone basic service customers in the Cincinnati exchange for whom Time Warner is not a competitive option. There will also be other customers in the Cincinnati exchange for whom Current will not be a competitive option. This is contrary to both prongs of the R.C. 4927.03(A)(1) (Appx. at 000593) tests. CBT is not "subject to

⁹⁵ Application at 3-7 (Time Warner) (Supp. at 000001-000005), 7-8 (Current) (Supp. at 000005-000006).

⁹⁶ Williams Affidavit, ¶43 (Supp. at 000059).

⁹⁷ Id., ¶44 (emphasis in original) (Supp. at 000061), quoting Application at 6 (Supp. at 000004).

⁹⁸ Id., ¶53 (Supp. at 000064).

competition” from Time Warner in part of the Cincinnati exchange, and is not “subject to competition” from Current in part of the Cincinnati exchange.⁹⁹ Likewise, customers in part of the Cincinnati exchange do not have a readily available alternative from Time Warner, and customers in part of the Cincinnati exchange do not have a readily available alternative from Current.¹⁰⁰

2. The PUCO’s rationale for accepting Time Warner and Current does not comport with the statute.

As discussed above, the PUCO chose the exchange as the unit of analysis for its competitive tests. As the PUCO subsequently stated:

The Commission, in selecting an “exchange” as the market where competition for an ILEC’s basic service can be evaluated * * * clearly stated that a exchange would a) exhibit similar market conditions within its boundary; b) provide an objective definition that would allow for examination of competition on a reasonable granular level; and c) be practical to administer as ILECs collect and report data at the exchange level in their annual reports that are submitted to the Commission.¹⁰¹

But from a telephone service standpoint, the Cincinnati exchange does not exhibit similar market conditions within its boundary, because Time Warner and Current each serve only parts of the exchange.

The PUCO asserted that under its interpretation of OCC’s argument, the market would have to be defined by units as small as a city block.¹⁰² This is essentially a straw man argument, because the question is actually a simpler one: Given the geographic market **as the PUCO has**

⁹⁹ R.C. 4927.03(A)(1)(a) (Appx. at 000593).

¹⁰⁰ R.C. 4927.03(A)(1)(b) (Appx. at 000593).

¹⁰¹ Opinion and Order at 26, citing 05-1305 Opinion and Order at 18-19 (footnote omitted) (Appx. at 000083).

¹⁰² Opinion and Order at 28 (Appx. at 000085).

defined it, does the alternative provider serve the entirety of that market? And the answer, for both Time Warner and Current, is no.

What the PUCO has done, subsequent to the rulemaking, is to redefine the geographic market that will be evaluated in the Competitive Tests, specifically Test 4. The rule adopted by the PUCO -- Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000607) -- states that:

In order to qualify for pricing flexibility for basic service and other tier one services, the applicant has the burden to demonstrate that as of the date of the application, the ILEC meets at least one of the competitive market tests set forth in paragraph (C) of this rule **in each of the requested telephone exchange area(s)**. Thus, an application for alternative regulation of basic service and other tier one services may contain more than one telephone exchange area, but the test(s) must be applied to **each telephone exchange area individually** within that application.

(Emphasis added.) Likewise, Test 4 requires that:

An applicant must demonstrate that **in each requested telephone exchange area** that at least fifteen per cent of total residential access lines have been lost since 2002 as reflected in the applicant's annual report filed with the commission in 2003, reflecting data for 2002; and the presence of at least five unaffiliated facilities-based alternative providers serving the residential market.¹⁰³

The PUCO's test would not allow basic service alt. reg. based on a 15% line loss in part of an exchange. Likewise, the rule should not allow alt. reg. based on the presence of alternative providers in parts of the exchange. As the PUCO has implemented the rule, however, an ILEC is merely required to meet the competitive test **in some portion** of an exchange. Indeed, under the PUCO's logic, if a competitor had facilities that could serve only one customer in an exchange, that would be sufficient to allow the incumbent to raise stand-alone basic service rates for all the

¹⁰³ Ohio Adm. Code 4901:1-4-10(C)(4) (emphasis added) (Appx. at 000608).

other customers in that exchange. The PUCO's implementation of the rule is internally inconsistent and counter to the public interest.¹⁰⁴

Regarding Time Warner, the PUCO accepted its candidacy as an alternative provider because "the data in the present record demonstrates that Time Warner's cable franchise area covers **the majority** of both the Cincinnati and Hamilton exchanges * * *."¹⁰⁵ This stands as an admission that there are portions of the Cincinnati and Hamilton exchanges where Time Warner's services are not available at all, much less "readily available" as directed by the statute.

To make matters worse, the PUCO's approach to Current abrogated even this low standard. The PUCO stated, "We reject OCC's argument that Current Communications' offering is available in 'some areas of the Cincinnati exchange' and is not available throughout the exchange, **for the same reasons we discussed above with respect to Time Warner Cable's service availability.**"¹⁰⁶ Yet the record does not contain any information showing that Current's service is available anywhere but in "some areas of the Cincinnati exchange," much less in a majority of the exchange or throughout the exchange. In fact, **CBT's application itself** stated that Current "offers broadband over power line service **in some areas of the Cincinnati exchange.**"¹⁰⁷ Indeed, it appears that Current's main base is "one of the **small** areas not currently served by Time Warner * * *."¹⁰⁸

¹⁰⁴ R.C. 4927.03(A)(1) (Appx. at 000593).

¹⁰⁵ Opinion and Order at 26 (emphasis added) (Appx. at 000083).

¹⁰⁶ Id. (emphasis added).

¹⁰⁷ Application, Exhibit 3 at 7 (emphasis added) (Supp. at 000012A).

¹⁰⁸ Id. at 8 (emphasis added) (Supp. at 000012B).

The PUCO's acceptance of Current's candidacy thus means that the rule is reduced to requiring the presence of an alternative provider in some portion of, or a small area of, a particular exchange. This is obviously contrary to the PUCO's own recitation, quoted above, of its "clear description" of the purpose of selecting an exchange as the unit of measurement.

CBT asserted that "it would be unreasonable to require CBT to prove that each and every one of its competitors offers service to each and every CBT customer; the standard must be interpreted in a reasonable manner based on the information that would be available to a competitor."¹⁰⁹ As OCC stated and reiterated, the information on Time Warner's and Current's service areas would be available to CBT.¹¹⁰ That information shows that there are significant parts of CBT's exchanges where neither provider offers service, meaning that CBT customers in those areas will not have the Time Warner or Current alternatives to CBT's basic service. Indeed, CBT acknowledged that these providers did **not** serve the entirety of the exchanges. This is thus not a flaw in OCC's argument, as the PUCO alleged,¹¹¹ and not a flaw in the alternative providers prong of Test 4 as written, but rather a demonstration that CBT cannot meet the test using these providers, and thus should not be allowed to subject its customers to basic service alt. reg. rate increases in the exchanges that CBT proposed.¹¹²

¹⁰⁹ CBT Response at 32 (Supp. at 000068); see also Opinion and Order at 26 (Appx. at 000083).

¹¹⁰ See OCC Application for Rehearing at 29-30 (Appx. at 000143-000144).

¹¹¹ See Opinion and Order at 28 (Appx. at 000085).

¹¹² If CBT had presented stand-alone basic service providers that served the entirety of its exchanges, or if the PUCO had required such a presentation, then this appeal would not have been necessary.

3. The wireless carriers do not provide service throughout the CBT exchanges.

The PUCO found that the offerings of four wireless providers (Cingular, Sprint, T-Mobile and Verizon) are “reasonably available to customers of the Cincinnati and Hamilton exchanges * * *.”¹¹³ The PUCO relied on the carriers’ coverage maps submitted by CBT for this finding.¹¹⁴ This reliance was in error. The statute requires the PUCO to consider whether services are “readily” available, not just “reasonably” available.¹¹⁵ This Court has not allowed the PUCO to legislate; that is the role of the Ohio General Assembly, whose statute the PUCO is, in effect, amending. Moreover, the PUCO disregarded OCC’s extensive demonstration that the wireless carriers, according to their own disclaimers, cannot guarantee that their service will work for customers at any particular location, much less indoors at any particular location.¹¹⁶

First, there is the fact that the coverage maps do not include any objective standard for signal strength.¹¹⁷ Only the Cingular map and the T-Mobile map uncovered by Dr. Roycroft¹¹⁸ even attempt to show signal strength. But the disclaimers that accompany the maps show their limited reliability. The disclaimer that accompanies Verizon Wireless’ coverage maps is the most extensive:

- The maps that display within the Coverage Locator Tool are not a guarantee of coverage and contain areas with no service. The maps rendered

¹¹³ Id. (Appx. at 000085).

¹¹⁴ Id.

¹¹⁵ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

¹¹⁶ Roycroft Affidavit, ¶¶100-104 (Supp. at 000037-000042).

¹¹⁷ Id., ¶98 (Supp. at 000036).

¹¹⁸ Roycroft Attachment TRR-4 and 7 (Supp. at 000043-000051).

show only approximations (based on our internal data) of where rates and coverage apply.

- Verizon Wireless coverage depictions in the rate and coverage maps are based on generally accepted engineering predictive and modeling tools, used to measure radio frequency transmissions from cell towers. Our rate and coverage maps depict wireless coverage based on predictive modeling parameters determined by our network engineers.
- Since wireless service is transmitted on a radio signal over the airways, it is subject to network and transmission limitations such as cell site availability (particularly near boundaries and in remote areas).
- Your wireless equipment, weather, topography and other environmental considerations associated with radio technology, also affects wireless service. For example, your wireless phone may work perfectly driving home one night, but then not work as well driving in the same place the next night during a thunderstorm. Additionally, service may vary significantly within buildings....¹¹⁹

Notably, CBT's application did not even mention these substantial disclaimers, which appear on all of the websites of each of the carriers that CBT asserts provide service in the Cincinnati and Hamilton exchanges.¹²⁰

Clearly, with regard to the wireless carriers' coverage, the PUCO did not hold CBT to its ostensible burden of proof to "demonstrate that as of the date of the application, the ILEC meets" the competitive test.¹²¹ Instead, the PUCO has lowered the bar in order to ensure that the incumbent will meet the test. If the wireless carriers served the whole exchange with a stand-alone basic service at a competitive price, this would meet the statute. But they do not.

¹¹⁹ Roycroft Affidavit, ¶104, citing <http://www.verizonwireless.com/b2c/coveragelocator/mapInformation.jsp> (Supp. at 000040).

¹²⁰ Roycroft Affidavit, ¶¶100-104 (Supp. at 000037-000042).

¹²¹ Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000607).

C. Proposition of Law No. 3: The Public Utilities Commission of Ohio erred as a matter of law when it adopted a rule that allows alternative regulation pursuant to R.C. 4927.03(A) for stand-alone basic service based on an incumbent telephone company's line losses

The line loss prong of PUCO Test 4 requires a showing that the incumbent has lost 15% of its residential access lines in an exchange. But that showing does not demonstrate that CBT's stand-alone basic service is subject to competition, or that CBT's stand-alone basic service customers have reasonably available alternatives for their service. It also does not demonstrate that there are no barriers to entry for stand-alone basic service. The line loss prong says nothing about the "number and size of alternative providers of services."¹²² The line loss prong says nothing about the "extent to which services are available from alternative providers in the relevant market."¹²³ The line loss prong says nothing about the "ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions."¹²⁴ The line loss prong also says nothing about "[o]ther indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services."¹²⁵ Therefore, the line loss prong of Test 4 says nothing about the factors that the General Assembly directed the PUCO to consider in deciding whether to grant alt. reg. for CBT's stand-alone basic service.

The PUCO's defense of its finding underscores the line loss prong's major flaw. The PUCO stated, "It is clear from the record that it would be impossible for CBT, and equally any

¹²² R.C. 4927.03(A)(2)(a) (Appx. at 000593).

¹²³ R.C. 4927.03(A)(2)(b) (Appx. at 000593).

¹²⁴ R.C. 4927.03(A)(2)(c) (Appx. at 000593).

¹²⁵ R.C. 4927.03(A)(2)(d) (Appx. at 000593).

ILEC, to identify where the lost residential access lines went * * *.”¹²⁶ That is true, given the unrefined nature of the global line loss test. But neither can the PUCO identify where the lost residential access lines went, whether to CBT’s own digital subscriber line service (“DSL”), or to CBT’s affiliate wireless carrier, as the PUCO acknowledged that OCC asserted.¹²⁷ The inability to determine where the lost residential access lines went undermines the use of the line loss test for meeting R.C. 4927.03(A) (Appx. at 000593), which requires the lines to have gone to competition for stand-alone basic service or to alternatives to stand-alone basic service. In Competitive Test 3 (Ohio Adm. Code 4901:1-10(C)(3) (Appx. at 000608)), the PUCO included a prong that calls for the incumbent to calculate the competitors’ market share. Clearly, in that context the PUCO believed that the incumbent would be able to identify what portion of the market the competitors had captured.

The PUCO asserted “that there is no data in the record to support OCC’s allegation that **all** disconnected residential access lines were used for Internet access, not for voice communications * * *.”¹²⁸ The PUCO was correct that, if OCC had so alleged, there would be no data in the record to support the proposition. But OCC did not allege any such thing. **There is also no data in the record to show what portion of the line loss went to competition for, or alternatives to, CBT’s stand-alone basic service.**

¹²⁶ Opinion and Order at 17 (Appx. at 000074); see also Entry on Rehearing at 4 (Appx. at 000093).

¹²⁷ Opinion and Order at 15 (Appx. at 000072).

¹²⁸ Id. at 17 (emphasis added) (Appx. at 000074).

Likewise, the PUCO asserted that OCC's argument was "residential access lines lost to CBT's wireless affiliate should be excluded from the 15 percent total residential line loss calculation."¹²⁹ This ignores most of OCC's argument, which was, as the PUCO itself stated, that:

an ILEC residential access line could be lost to: an unregulated competitor like a VoIP provider, an affiliate or unaffiliated wireless provider, disconnected due to a move, converted to DSL provided by an ILEC affiliate, converted to DSL provided by an unaffiliated provider, or converted to cable modem service provided by an unregulated entity.¹³⁰

Most of those losses have nothing to do with the statutory standard of whether customers have competition or alternatives for stand-alone basic service, or whether there are barriers to entry for stand-alone basic service. Lines lost to an incumbent telephone company's wireless affiliate are not a measure of whether stand-alone basic service is subject to competition or has reasonably available alternative, and neither are lines lost to others of the identified categories. The line loss prong does not give the PUCO any reliable information regarding competition for customers or customers' alternatives to stand-alone basic service.

With regard to this point, the PUCO alleged that the line loss test addresses barriers to entry because it shows a "reasonable number of providers offering competing services" and that "a significant number of residential subscribers * * * now perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's basic service."¹³¹ But because, as the PUCO admitted, there is no way to discern to what provider(s) the lost residential

¹²⁹ Id. at 17 (Appx. at 000074).

¹³⁰ Id. at 18 (Appx. at 000075).

¹³¹ Id. at 12 (Appx. at 000069).

lines went, the line loss test shows nothing of the sort; the PUCO's statement lacks any basis in the record.¹³²

The PUCO's rationale and support for the line loss prong in the rule fail to show that the prong meets the statute. The PUCO's application of the prong to the specific situation in the Cincinnati and Hamilton exchanges also fails to show that CBT's stand-alone basic service in those two exchanges satisfies R.C. 4927.03(A) (Appx. at 000593).

With regard to the line loss prong, the PUCO stated:

[T]he Commission, in its rules, focused on specific factors demonstrating for residential basic service customers that all of the statutory criteria found in Section 4927.03(A), Revised Code, have been satisfied. For example, to the extent that an ILEC can demonstrate that it has lost a "real" percentage of its residential customer base and that there are competitive alternatives available to basic service customers, the Commission is satisfied that barriers to entry are not restricting the ability of competitors to compete.¹³³

Also as to the line loss criterion, the PUCO stated that "the test components measuring access line losses do measure basic service competition because each access line customer previously purchased basic service from the ILEC."¹³⁴ Both of these reasons ignore the fact that neither the PUCO nor CBT has any idea what portion -- if any -- of the "line loss" is attributable to competition from providers of "functionally equivalent or substitute services" to stand-alone

¹³² See *Vectren Energy Delivery of Ohio, Inc., v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 182, 2007-Ohio-386, ¶9.

¹³³ Opinion and Order at 18 (Appx. at 000075).

¹³⁴ *Id.*

basic service, or to alternatives to stand-alone basic service, that is directed in the statute. The line loss prong fails to provide any reliable information relevant to the statute.¹³⁵

D. Proposition of Law No. 4: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) for CBT's stand-alone basic service without a showing of a lack of barriers to entry for stand-alone basic service. Rules that permit such a grant are invalid.

As discussed above, in determining when alt. reg. can be allowed for basic service, the General Assembly added a specific requirement to the competition and alternatives requirements that are the subject of Propositions of Law 1-3. The law now provides that “[t]o authorize an exemption or establish alternative regulatory requirements under division (A)(1) of this section with respect to basic local exchange service, the commission additionally shall find that **there are no barriers to entry.**”¹³⁶

With regard to this requirement, in the 05-1305 Entry on Rehearing, the PUCO justified the competitive market tests as follows:

Consumer Groups’ arguments appear to be premised on the belief that in order for an ILEC to satisfy H.B. 218, any condition that makes entry more difficult must be removed for all potential competitors. The Commission finds such an interpretation to be unreasonable and impractical. Realistically, all companies are confronted with at least some conditions that make entry difficult. Therefore, the primary issue becomes an analysis of whether these difficulties can be overcome by some competitors or whether market conditions involve true barriers to entry

¹³⁵ If CBT had presented information on the loss of its stand-alone basic service lines to other providers of stand-alone basic service, or if the PUCO had interpreted its rule to require such information, this would more likely show the existence of competition or alternatives to stand-alone basic service and the lack of barriers to entry for that service.

¹³⁶ R.C. 4927.03(A)(3) (emphasis added) (Appx. at 000593).

that prevent or significantly impede entry beyond those risks and costs normally associated with market entry.¹³⁷

The PUCO also stated, “If H.B. 218 stands for the proposition that all conditions that make entry difficult have to be eliminated for all potential competitors, such an interpretation will create an insurmountable burden of proof for an ILEC to satisfy.”¹³⁸

Contrary to the explicit words of the statute, the PUCO thus interpreted “no barriers to entry” as meaning “no barriers to entry sufficient to prevent or significantly impede market entry.” In fact, if R.C. 4927.03(A)(3) (Appx. at 000593) is interpreted as the PUCO would have it, then the “additional” test from H.B. 218 is mere surplusage and the General Assembly’s intention for an additional protection for consumers is effectively written out of the law by PUCO fiat.¹³⁹ If there were barriers to entry sufficient to prevent or significantly impede market entry for basic service, then basic service could not be subject to competition or have reasonably available alternatives, as the tests from R.C. 4927.03(A)(1) (Appx. at 000593) require. The General Assembly is presumed to want all parts of a statute to be operative. R.C. 1.47 (Appx. at 000560A). Surplusage is not to be found lightly.¹⁴⁰

As a matter of fact, the market test proposed by OCC and the other Consumer Groups did not take the extreme position alleged by the PUCO. The Consumer Groups’ market tests provision on barriers to entry was that:

The applicant must demonstrate that there are no barriers to entry associated with the provision of basic service. The applicant must provide

¹³⁷ 05-1305 Entry on Rehearing at 17-18 (Appx. at 000527-000528).

¹³⁸ Id. at 18 (Appx. at 000528).

¹³⁹ See *Canton Storage and Transfer Co., v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 17.

¹⁴⁰ *East Ohio Gas v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299.

evidence of the absence of factors which would inhibit timely, significant, and sustainable market entry. The applicant must present evidence, including market share evidence, that market entry in each exchange is resulting in the provision of basic service throughout the exchange, outside of packages or bundles, by unaffiliated [competitive local exchange carriers] CLECs and facilities-based CLECs.¹⁴¹

This application of the statute is consistent with the policy of the State to “[r]ely on market forces, where they are present and capable of supporting a healthy and sustainable, competitive telecommunications market, to maintain just and reasonable rates,”¹⁴² unlike the PUCO-adopted Test 4 used by CBT, which does not require any such showing.

The PUCO also stated that “all of the types of barriers to entry identified by Dr. Roycroft in this proceeding are general, and that he failed to identify a single barrier to entry that applies specifically to CBT’s operations in either of the Cincinnati and Hamilton exchanges.”¹⁴³ This is ironic, because neither the PUCO nor CBT did any CBT-specific or Cincinnati/Hamilton-specific review of barriers to entry; rather, the PUCO and CBT depended entirely on the PUCO’s generic, yet incorrect, determination in the 05-1305 rulemaking that Test 4 adequately meets the requirements of R.C. 4927.03(A)(3) (Appx. at 000593).¹⁴⁴

In defending Test 4’s treatment of barriers to entry, the PUCO stated:

The Commission finds significance in the facts that an ILEC experiences a threshold loss of at least 15 percent of the total residential access lines and that the relevant market (at the exchange level) has the presence of at least five unaffiliated facilities-based alternative providers serving residential

¹⁴¹ See 05-1305 Entry on Rehearing at 20, n.2 (Appx. at 000530).

¹⁴² R.C. 4927.03(A)(2) (Appx. at 000593).

¹⁴³ Opinion and Order at 12 (Appx. at 000069).

¹⁴⁴ The PUCO’s view on this point puts the burden on OCC to show that CBT does not meet the statute, whereas the PUCO’s rules put the burden of meeting the statute squarely on CBT. Ohio Adm. Code 4901:1-4-10(A) (Appx. at 000607).

customers. The criteria set forth for Rule 4901:1-4-10(C)(4), O.A.C., allows for the conclusion that if this criteria is satisfied there are a reasonable number of providers offering competing services in the relevant market and that a significant number of residential subscribers in an exchange now perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES.¹⁴⁵

As discussed above, the fact that the alternative providers accepted by the PUCO do not provide stand-alone basic service means that Test 4 says nothing about barriers to entry for basic service. Likewise, if the PUCO is unable to determine what portion of an incumbent's lost lines is due to competition for customers and what portion is due to other reasons, such as migration of customers' second lines to DSL for using the Internet (even the incumbent's DSL),¹⁴⁶ then the PUCO cannot reasonably determine that there are no barriers to entry for firms seeking to enter the basic service market in the ILEC's territory. Specifically, the PUCO asserted that the line loss test addresses barriers to entry because it shows a "reasonable number of providers offering competing services" and that "a significant number of residential subscribers * * * now perceive those service offerings as a reasonably available substitute offering that competes with the ILEC's BLES."¹⁴⁷ The line loss test shows nothing of the sort; the Commission's statement lacks any basis in the record.

Neither the PUCO nor CBT has shown that there are no barriers to entry for stand-alone basic service.¹⁴⁸ Other than CBT, there are no providers of stand-alone basic service for

¹⁴⁵ Opinion and Order at 12 (Appx. at 000069).

¹⁴⁶ See Proposition of Law No. 3.

¹⁴⁷ Id. at 12.

¹⁴⁸ See Proposition of Law 3.

customers in the Cincinnati and Hamilton exchanges, a sure sign of barriers to entry for the provision of that service.

E. Proposition of Law No. 5: The Public Utilities Commission of Ohio erred as a matter of law when it granted alternative regulation pursuant to R.C. 4927.03(A) to CBT's stand-alone basic service without a showing that alternative regulation is in the public interest. Rules that permit such a grant are invalid.

R.C. 4927.03 (Appx. at 000593) has contained, since its first enactment in 1989, a requirement that the PUCO find any alt. reg. plan to be in the public interest.¹⁴⁹ In its first iteration of rules for alt. reg., the PUCO required incumbents to include commitments as part of their submitted alt. reg. plans,¹⁵⁰ in order to ensure that the public interest was met. Commitments were made by each of the three companies that applied for "traditional" alt. reg., including CBT.¹⁵¹

Likewise, in the so-called elective alt. reg. rules, the PUCO required public interest commitments of incumbents applying for alt. reg.¹⁵² Companies applying for elective alt. reg., like CBT, made those commitments.¹⁵³

¹⁴⁹ The PUCO may grant alt. reg. "provided the commission finds that any such measure is in the public interest * * *." R.C. 4927.03(A)(1) (Appx. at 000593).

¹⁵⁰ *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchange Companies*, Case No. 92-1149-TP-COI, Finding and Order (January 7, 1993), Appendix 1 at 7 (Appx. at 000427-000428).

¹⁵¹ See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation and for a Threshold Increase in Rates*, Case No. 93-432-TP-ALT, Opinion and Order (May 5, 1994) (Appx. at 000157).

¹⁵² Ohio Adm. Code 4901:1-4-06 (Appx. at 000598). Although OCC argued about the sufficiency of those commitments, it has never been questioned that these were benefits the companies had to provide to their customers as a condition of receiving the elective alt. reg. regulatory flexibility that included the ability to raise most rates.

¹⁵³ E.g., *In the Matter of the Applications of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4 Ohio Administrative Code*, Case No. 04-720-TP-ALT, Finding and Order (June 30, 2004) (Appx. at 000226).

In the 05-1305 basic service alt. reg. rulemaking proceeding, the Consumer Groups (which included OCC) proposed that the PUCO require incumbents seeking basic service alt. reg. to make additional commitments to enhance the public interest.¹⁵⁴ The PUCO rejected that proposal.¹⁵⁵ The PUCO again rejected the proposal on rehearing.¹⁵⁶

This proceeding reinforces the error in the PUCO's decision. Here, the PUCO granted alt. reg. for CBT's stand-alone basic service in the Cincinnati and Hamilton exchanges based on: (1) a "line loss" test that says little or nothing about whether the lines were lost as a result of the existence of competition or alternatives to stand-alone basic service; (2) the presence of wireless carriers that offer services substantially different in price and function from CBT's stand-alone basic service, and that cannot commit to offering their service at any particular location in the exchanges; and (3) the existence of other providers that also offer services substantially different in price and function from CBT's stand-alone basic service, and that cannot offer their services in the entirety of the exchanges.

In this case, the PUCO dismissed OCC's public interest arguments without any discussion.¹⁵⁷ The PUCO asserted that CBT has met its burden of proving that granting alt. reg. for its stand-alone basic service is in the public interest.¹⁵⁸ Yet CBT's customers receive

¹⁵⁴ 05-1305, Consumer Groups Comments (December 6, 2005) at 37-38; *id.* (Supp. at 000085), Consumer Groups Reply Comments (December 22, 2005) at 22 (Supp. at 000124).

¹⁵⁵ 05-1305 Opinion and Order at 11 (Appx. at 000450).

¹⁵⁶ 05-1305 Entry on Rehearing at 2 (Appx. at 000512).

¹⁵⁷ Opinion and Order at 7-8 (Appx. at 000064-000065).

¹⁵⁸ *Id.* at 30 (Appx. at 000087).

nothing in exchange for the rate increases that CBT has already imposed.¹⁵⁹ In the context of the PUCO's previous alt. reg. requirements, this makes no sense.

In the Entry on Rehearing on this issue, the PUCO stated:

With respect to OCC's arguments concerning additional ILEC commitments under BLES alternative regulation, we previously determined that enhanced or additional ILEC commitments would not be appropriate in a competitive environment. We believe that in a competitive environment an ILEC should have the appropriate incentives to deploy additional advanced services and provide other public benefits to consumers. (05-1305 Entry on Rehearing at 2; 05-1305 Opinion and Order at 11.)¹⁶⁰

This is both curious and illogical. The commitments required in the elective alt. reg. rules were part of the PUCO's finding that all non-basic services of all the incumbents were subject to competition and that customers had reasonably available alternatives to those non-basic services.¹⁶¹ If commitments were appropriate in that competitive environment, there is no reason why they would not be appropriate in this "competitive" environment.¹⁶² The Commission's failure to adopt additional commitments in the basic service alt. reg. rules should be reversed. In any event, the PUCO's decision to allow CBT to annually increase customers' rates without additional review should be reversed as contrary to the statutory requirement that a grant of alt. reg. must serve the public interest.

¹⁵⁹ See footnote 4, *supra*.

¹⁶⁰ Entry on Rehearing at 12 (Appx. at 000101).

¹⁶¹ *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulation Framework for Incumbent Local Exchange Carriers*, PUCO Case No. 00-1532-TP-COI, Opinion and Order (December 6, 2001) at 14 (Appx. at 000352).

¹⁶² See *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431.

III. CONCLUSION

The PUCO's rules for basic service alt. reg. do not meet the requirements of R.C. 4927.03 (Appx. at 000593) under which alt. reg. can be granted to a service. Neither does the proof put forward by CBT to justify alt. reg. for its stand-alone basic service meet the requirements of the statute. The PUCO's order granting alt. reg. for CBT's stand-alone basic service in the Cincinnati and Hamilton exchanges must be reversed.

Respectfully submitted,

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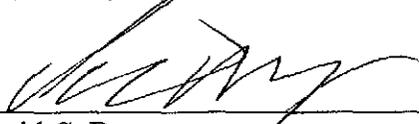


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief submitted on behalf of Appellant, the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid upon the counsel listed below this 2nd day of July, 2007.



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